STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 19, 2006
v	No. 266153 Wayne Circuit Court
DARRIN ANDREW HENRY, Defendant-Appellee.	LC No. 05-007353-01

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for dismissal of a charge of copying an audio/video recording for gain, MCL 752.1052; MCL 752.1054(2), which followed an order granting defendant's motion to suppress evidence. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At approximately 11:45 p.m., the police observed defendant walking in an alley behind a church. The church was in a high crime area and had been subject to previous break-ins. As the officers approached in an unmarked car, defendant went behind a utility pole and emerged without a blue bag that he had been carrying. The police immediately recovered the bag and found the recordings inside.

In suppressing the evidence, the trial court held that the encounter with defendant was a shakedown not countenanced by the Fourth Amendment, and that the search of the bag was not justified on the ground that defendant had abandoned it. The trial court noted that defendant may not have known who was approaching him, and may have concealed the bag for this reason, or simply because it was heavy.

Plaintiff first argues that the trial court erred in characterizing the encounter as a seizure. We agree. Although the officer indicated that in his mind defendant was not free to leave, *People v Jenkins*, 472 Mich 26; 691 NW2d 759 (2005), indicates that this is not dispositive:

> [N]ot every encounter between a police officer and a citizen requires a [reasonable suspicion justifying a *Terry* stop.] A "seizure" within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave. *People v Mamon*, 435 Mich 1, 11; 457 NW2d 623 (1990). When an officer approaches a

> person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized. *Florida v Royer*, 460 US 491, 497-498; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion). [*Id*. at 33].

Here, there was no reasonable suspicion that might have justified a *Terry* stop. However, at the time the bag was searched, the encounter had not escalated to a "stop" under *Jenkins, supra*. In *Jenkins, supra*, the Court held that a "seizure" did not occur until the officer "actually hindered defendant's attempt to leave the scene." *Id*. at 34. Here, to the extent the trial court characterized the officer's encounter with defendant as a shakedown, meaning a stop to check out whether anything was happening even though there was no basis for a reasonable suspicion, *Jenkins, supra*, appears to allow this kind of intrusion. No evidence indicates that the police were going to do anything other than "approach[] a person and seek[] voluntary cooperation through noncoercive questioning." Thus, at the time the bag was checked, there had not yet been a "seizure."

However, the trial court properly held that the blue bag had not been abandoned and could therefore not be searched without defendant's consent. A trial court's findings of fact in a suppression hearing are reviewed for clear error, but its ultimate decision on a motion to suppress is reviewed de novo. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). In *People v Shabaz*, 424 Mich 42, 65-66; 378 NW2d 451 (1985), our Supreme Court held:

> "Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent." *Friedman v United States*, 347 F2d 697, 704 (CA 8, 1965). "The proof supporting abandonment should 'reasonably beget the exclusive inference of throwing away . . . .'" *People v Howard*, 50 NY2d 583, 593; 408 NE2d 908; 430 NYS2d 578 (1980).

Where the defendant threw a paper bag containing a gun to the floor and "it [wa]s unclear from the evidence whether defendant actually intended to throw away the bag or to continue to conceal it by hiding it," abandonment was not established. *Shabaz, supra* at 66. In contrast, where a defendant threw away a bag containing cocaine while police were following him, "the defendant unquestionably relinquished any reasonable expectation of privacy in the bag" and therefore it was abandoned. *People v Mamon*, 435 Mich 1, 9; 457 NW2d 623 (1990). See also *People v Rice*, 192 Mich App 512; 482 NW2d 192 (1992) (the defendant abandoned bags where he denied ownership of luggage on an airport carousel).

Here, defendant did not discard the blue bag while the police were pursuing him or otherwise throw the bag away. He set the bag down nearby before the police approached him. While he may have been trying to distance himself from the bag and/or give the appearance that the bag was not his, the evidence does not establish that "the defendant unquestionably relinquished any reasonable expectation of privacy in the bag." *Mamon, supra* at 9. Stated differently, "[t]he proof supporting abandonment [did not] 'reasonably beget the exclusive inference of throwing away." *Shabaz, supra* at 66. It is equally plausible that defendant set the bag down nearby with the intent of picking it up again. Thus, the trial court did not clearly err in finding that abandonment was not established.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Alton T. Davis